

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT A. GRAY, ET AL.

Plaintiffs,

v.

JEFFREY DERDERIAN, ET AL.,

Defendants.

Civ. No. 04-312-L

ESTATE OF JUDE B. HENAULT, ET AL.

Plaintiffs,

L

v.

AMERICAN FOAM CORPORATION, ET AL.

Defendants

Civ. No. 03-CV-483-

**RESPONSE OF ESSEX INSURANCE COMPANY IN SUPPORT
OF LLOYD'S MOTION FOR LEAVE TO FILE APPENDIX
CONTAINING RELEVANT INSURANCE POLICIES**

Defendant Essex Insurance Company ("Essex") respectfully submits the following memorandum in support of the March 22, 2005 Motion ("Motion") filed by Certain Underwriters at Lloyd's, London ("Lloyd's"). Essentially, Lloyd's Motion seeks the Court's leave to file a limited appendix in support of its Rule 12(b)(6) Motion to Dismiss, consisting of a copy of the Lloyd's insurance policies identified in the First Amended Master Complaint. Lloyd's argues that the insurance policies are central to

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Plaintiffs' claim of liability, and that the Court should be allowed to consider these policies without converting the Motion to Dismiss into a Motion for Summary Judgment under Fed. R. Civ. P. 56. See, e.g., Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988). For the reasons discussed in the attached Memorandum, Essex agrees.

For the reasons set forth in the attached Memorandum, Essex respectfully requests that this Court allow Lloyd's Motion for Leave to File Appendix, and consider the insurance policies appended as part of Lloyd's and Essex's Motions to Dismiss.

Respectfully submitted,

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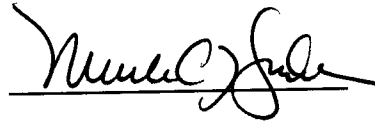
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Dated: March 30, 2005

CERTIFICATION

I certify that on the 30th day of March, 2005, I served a true copy of the within document, Essex' Response to Lloyd's Leave to File Appendix, via first class mail, postage pre-paid, or by electronic mail to the parties listed below.



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**MEMORANDUM OF RESPONSE OF ESSEX INSURANCE COMPANY IN SUPPORT
OF LLOYD'S MOTION FOR LEAVE TO FILE APPENDIX
CONTAINING RELEVANT INSURANCE POLICIES**

Defendant Essex Insurance Company ("Essex") respectfully submits the following memorandum in support of the March 22, 2005 Motion ("Motion") filed by Certain Underwriters at Lloyd's, London ("Lloyd's"). Essentially, Lloyd's Motion seeks the Court's leave to file a limited appendix in support of its Rule 12(b)(6) Motion to Dismiss, consisting of a copy of the Lloyd's insurance policies identified in the First Amended Master Complaint. Lloyd's argues that the insurance policies are central to Plaintiffs' claim of liability, and that the Court should be allowed to consider these policies without converting the Motion to Dismiss into a Motion for

Summary Judgment under Fed. R. Civ. P. 56. See, e.g., Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988). For the reasons below, Essex agrees.

Essex's Interest In Lloyd's Motion

In one sense, Essex has no direct interest in the outcome of Lloyd's Motion. Essex has already completed briefing on its own Motion to Dismiss; that Motion has been fully argued and is awaiting a ruling from the court. Although Essex, like Lloyd's, filed an appendix containing the Policy to which Plaintiffs' claims related, none of Plaintiffs' responsive briefs challenged the inclusion of the Essex Policy in the Rule 12(b)(6) record.¹ None of Plaintiffs' briefs argued that the Essex Policy was not authentic or that discovery was required to establish its authenticity. None of Plaintiffs' briefs argued that the inclusion by Essex of its Policy converted the Essex Motion to Dismiss into a Motion for Summary Judgment. Plaintiffs' failure to challenge the inclusion of the Essex Policy as part of the Rule 12(b)(6) record means that – so far as Essex is concerned – Plaintiffs have waived any argument as to the authenticity of this material, or the

¹ Plaintiffs have foregone at least twelve separate opportunities to challenge the inclusion of the Essex Policy as part of Essex's Motion to Dismiss: [1] on August 25, 2004, when Essex filed its Motion for Release from General Order #2002-01 Relating to Page Limits, which Plaintiffs did not oppose; [2] on September 30, 2004, when Plaintiffs filed their Memorandum of Law in Support of Objection to Motion to Dismiss Master Complaint Against Essex Insurance Co.; [3] on October 15, 2004, when Essex served its Notice of Filing of Appendix, Motion to Dismiss, and Memorandum Pursuant to the Granting of its Motion for Relief From General Order #2002-01; [4] on November 4, 2004, when Essex served its Reply in Support of Motion to Dismiss Master Complaint; [5] on November 16, 2004, when the Property and Casualty Insurance Association of America filed its Motion for Leave to File Amicus Curiae Brief, and its Amicus Curiae Brief in Support of Essex Insurance Company's Motion to Dismiss; [6] on December 3, 2004, when Essex, citing the Motion to Dismiss, filed its Objection to Plaintiffs' Motion to Amend Master Complaint, on grounds of futility; [7] on December 6, 2004, when Plaintiffs' counsel filed a letter brief containing supplemental authority on Essex's Motion to Dismiss – one day before the date set for hearing on Essex's Motion to Dismiss – ; [8] on December 7, 2004, when Lloyds filed its Memorandum in Support of its Objection to Motion to Amend Master Complaint, which incorporated the points and authorities set out by Essex in its Memorandum in Support of Motion to Dismiss; [9] on December 15, 2004, when Essex filed its Objection to Plaintiff Michele Smith's Motion to File First Amended Complaint, which expressly incorporated the Essex Motion to Dismiss; [10] on January 18, 2005, when Essex filed Notices of Adoption of Motion to Dismiss in each of eight cases (Grey v. Derderian, Guindon v. American Foam Corp., Henault v. American Foam, Kingsley v. Derderian, Paskowski v. Derderian, Passa v. Derderian, Roderiques v. American Foam, Sweet v. American Foam); [11] on January 20, 2005, when Plaintiffs filed their Memorandum of law in Support of Plaintiffs' Objection to Defendants Multi-State Inspections, Inc. and High Caliber Inspections, Inc.'s Motion to Dismiss (which expressly incorporated and referred to the Essex Motion to Dismiss); and [12] on February 4, 2004, when Essex filed its Notice of Adoption of Prior Submissions on Dismissal of Plaintiffs' Master Complaint.

propriety of its inclusion, and that the Essex Policy may appropriately be considered by the Court. See Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998) (trial court, ruling on Rule 12(b)(6) motion, could appropriately consider document referenced in complaint and attached by moving party, where "plaintiffs neither challenged the authenticity of the [document] nor moved to strike it from the record"); Fudge, 840 F.2d at 1015 (similar); Raytheon Co. v. Continental Cas. Co., 123 F.Supp.2d 22, 25 (D. Mass. 2000).

In a broader sense, however – even though Plaintiffs have waived any challenge to the inclusion of the Essex Policy – the outcome of the Lloyd's Motion is a matter of some consequence to Essex. Essex, like most insurers, frequently must litigate matters arising under or relating to its policies of insurance. In appropriate cases, it may elect to seek early dismissal of these cases under Rule 12(b)(6). In so doing, it frequently is useful to append a copy of the insurance policy under which a plaintiff's claims assertedly arise. An insurer's reference to its policy in such cases is based on a long line of judicial authority that allows courts to consider the contents of an extraneous document, without converting the motion to one for summary judgment, "if [the documents] are referred to in the plaintiff's complaint and are central to his claim." Wright v. Assoc. Ins. Cos. Inc., 29 F.3d 1244, 1248 (7th Cir. 1994); see also Beddall, 137 F.3d at 17; Clorox Co. v. Proctor & Gamble, 228 F.3d 24, 32 (1st Cir. 2000).

Lloyd's motion arises from, and draws on, this line of authority. To the extent that Plaintiffs now oppose Lloyd's Motion, or seek a contrary judicial finding from this Court, Essex respectfully requests an opportunity to be heard.

Argument

Where the authenticity of a document is undisputed, and the document is referenced in a Plaintiff's complaint (or central to the allegations thereof), courts in Rhode Island, the First

Circuit and elsewhere hold that “th[e] document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).” See Beddall, 137 F.3d at 17; Elgar v. Nat’l Cont’l/Progressive Ins. Co., 2001 WL 736045 at *4 (R.I. Super. June 18, 2001). In these circumstances, a defendant may attach the document as an exhibit to a Rule 12(b)(6) motion, and the court may properly consider the attachment, without converting the defendant's Rule 12(b)(6) motion to a motion for summary judgment. Clorox, 228 F.3d at 32; Beddall, 137 F.3d at 17; Fudge, 840 F.2d at 1015; Raytheon, 123 F.Supp.2d at 25..

Here, the insurance policies that Lloyd's (and Essex) seek to include in the Rule 12(b)(6) record are specifically referenced in Plaintiffs' First Amended Master Complaint. In fact, the First Amended Master Complaint purposefully describes the policy number, scope and term of each policy. See First Amended Master Complaint, ¶ 653 (as to Essex); ¶¶ 667-669 (as to Lloyds). These are not passing or inconsequential references. Rather, they set forth the basic framework for Plaintiffs' claim of negligence against Lloyds and Essex. See Clorox, 228 F.3d at 32; Beddall, 137 F.3d at 16-17 (complaint summarized parts of the agreement that supported claim of fiduciary relationship). The policies are integral to Plaintiffs' allegations because they define the nature and scope of the alleged duty undertaken by the respective insurance companies – which is, in turn, an essential element of liability. Clorox, 228 F.3d at 32 (court will consider documents “integral to assessing the sufficiency of the allegations”); Elgar, 2001 WL 736045 at *4 (holding complaint incorporated insurance policies by identifying policy numbers and specific provisions). See generally Greenberg v. Life Ins. Co., 177 F.3d 507, 514 (6th Cir. 1999) (considering insurance policies in motion to dismiss “vanishing premium” case, where “the insurance policies are referred to throughout the complaint,” and plaintiffs' causes of action “relates to and arises from the ... policies in question”); Raytheon, 123 F.Supp. at 25

(considering insurance policies in context of motion to dismiss coverage and bad faith action, where policies are "sufficiently referred to in the complaint") (citing Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)).

In addition to their centrality to the allegations of Plaintiffs' complaint, the policies are central to the arguments Plaintiffs have raised in opposition to Lloyd's (and Essex's) Motions to Dismiss. For example, in Plaintiffs' Memorandum of Law in Support of their Objection to Essex's Motion to Dismiss, the Plaintiffs concede that the alleged negligent inspection which serves as the basis of Essex's liability "was undertaken as part of a contract of insurance," Pl. Mem. Opp. Essex Mot. Dism. at 9, n. 11 (emphasis added), and cite liberally from the Policy as part of their argument against Essex's Rule 12(b)(6) Motion. See id. at 2, n.3 (arguing that Essex policy was a liability policy); p. 12 n. 15 (noting term of policy). At no point, as pointed out above, do Plaintiffs challenge the inclusion of the policy as part of the Rule 12(b)(6) record. See infra pp. 2-3 and n.1. Because Plaintiffs' own briefs refer repeatedly to the Essex Policy, and cite the Policy in support of their Rule 12(b)(6) defenses, there is ample basis for the Court to conclude that the Policy is integral to Plaintiffs' claims, may be considered in testing the legal sufficiency of Plaintiffs allegations. See, e.g., Clorox, 228 F.3d at 32; Beddall, 137 F.3d at 17; Fudge, 840 F.2d at 1015.

Finally, there will be no surprise or prejudice to the Plaintiffs as a result of the Court's consideration of the Essex or Lloyd's policies as part of the Rule 12(b)(6) briefing. As the First Circuit noted in Clorox, 228 F.3d at 32, a plaintiff that has actual notice of a document, and has relied on the document in framing its complaint, cannot properly complain of surprise or unfairness if the document is attached by its litigation adversary to a motion to dismiss. To the contrary, in these circumstances, considerations of fairness are best served by allowing a

defendant to introduce the insurance policies, as part of its motion to dismiss. "[T]he viability of [a plaintiff's] allegations should not be hamstrung simply because the plaintiff fails to append [the document]. ... Any other approach would seriously hinder recourse to Rule 12 motions, as a plaintiff could thwart the consideration of a critical document merely by omitting it from the complaint." Beddall, 137 F.3d at 17; Fudge, 840 F.2d at 1015, citing 5 C. Wright & A. Miller, Fed. Pract. & Proc. § 1327 at 489 (1969). Compare Plaintiffs' Memorandum of Law in Support of Objection to Defendants Multi-State Inspections, Inc. and High Caliber Inspections, Inc.'s Motion to Dismiss (January 20, 2005) (attaching copy of Multi-State inspection report, and arguing that the report "cannot come as a surprise to either Essex or Multi-State").


Conclusion

For the reasons set forth above, Essex respectfully requests that this Court allow Lloyd's Motion for Leave to File Appendix, and consider the insurance policies appended as part of Lloyd's and Essex's Motions to Dismiss.

Respectfully submitted,

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Dated: March 30, 2005

CERTIFICATION

I certify that on the 30th day of March, 2005, I served a true copy of the within document, Essex' Memorandum of Response to Lloyd's Leave to File Appendix, via first class mail, postage pre-paid, or by electronic mail to the parties listed below.



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